Supreme Court of the United States

OCTOBER TERM, 1954

No. 251

ROBERT SIMMONS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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Supreme Court of the United States

OCTOBER TERM, 1954

No.

ROBERT SIMMONS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, convicting the petitioner of a violation of the Universal Military Training and Service Act and sentencing him to the custody of the Attorney General.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. It appears as Appendix A to this petition. No opinion was written by the district court. The opinion by the Court of Appeals in the companion case of *United States* v. *Sicurella* referred to in the opinion in this case by the Court of Appeals is an appendix to the petition that accompanies this one.

JURISDICTION

The judgment of the Court of Appeals was entered on June 15, 1954. The time for filing this petition for writ of certiorari has been extended to August 14, 1954. This petition for writ of certiorari is filed within the extended time. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).—See also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure. Title 18, Section 3231, United States Code, confers jurisdiction on the trial court.

QUESTIONS PRESENTED

I.

The undisputed evidence showed that petitioner had conscientious objections to participation in both combatant and noncombatant military service. He showed that these objections were based on his sincere belief in the Supreme Being. The file established without dispute that his obligations were superior to those owed to the state or which arose from any human relation. There was no showing that those beliefs flowed from any political, philosophical or sociological views. The undisputed evidence showed that the objections were based solidly on the Word of God and the obligations that Simmons had to the Supreme Being.

The question here presented, therefore, is whether the denial of the claim for classification of petitioner by the appeal board as a conscientious objector was without basis

in fact and, consequently, the final 1-A classification was arbitrary and capricious.

II.

Section 6(j) of the act and Section 1626.25 of the Selective Service Regulations provide for the reference of the conscientious objector claim to the Department of Justice for appropriate inquiry and hearing. This is followed by a recommendation by the department to the appeal board on the conscientious objector claim. Petitioner had a hearing, after inquiry, that was followed by a report of the hearing officer to the Department of Justice and a recommendation by the Assistant Attorney General to the appeal board. The hearing officer of the department found petitioner to be a sincere and bona fide member of Jehovah's Witnesses, but recommended against the conscientious objector status. The draft board file of petitioner showed that while he was conscientiously opposed to direct participation in the armed forces he was a recent convert of Jehovah's Witnesses.

The Department of Justice placed weight on his being a recent convert and considered this as a basis for the denial of the conscientious objector status. The Court of Appeals also denied the classification for this reason stated by the Assistant Attorney General in his memorandum. The Court of Appeals held that because petitioner was a latecomer he was not a conscientious objector.

The question here presented, therefore, is whether the act and the regulations permit the Department of Justice to recommend to the appeal board to deny, and may the appeal board deny, the conscientious objector status because the petitioner, an objector to direct participation in the armed forces, is a recent convert to Jehovah's Witnesses.

III.

Following the preliminary denial of the conscientious objector status by the appeal board the case was referred

to the Department of Justice. The Federal Bureau of Investigation made a secret investigative report. The secret FBI report was turned over to the hearing officer. The hearing officer commanded Simmons to appear before him for a hearing. At the hearing the hearing officer had the FBI report before him. An adverse recommendation was made to the Department of Justice by the hearing officer. The Department of Justice in turn made an unfavorable recommendation to the appeal board. This was based upon the unfavorable evidence appearing in the FBI report.

At the hearing Simmons requested the hearing officer to give him the other unfavorable evidence that was in the report in addition to the statement that he had in the past hung around pool halls. At the hearing the hearing officer asked him if he was still carousing around and hanging out in pool halls. But he made no mention of the adverse evidence relied upon about the charges of beating his wife filed against petitioner in the state court. The hearing officer, therefore, failed and refused to give him vital information of an adverse nature requested by him. [19][1]

Petitioner contended that he had been denied his rights to procedural due process of law guaranteed by the act and the Constitution when the hearing officer failed to give him a fair and adequate summary of the adverse information appearing in the secret FBI report. [12-13] This point was raised in the motion for judgment of acquittal. [12-13] The motion for judgment of acquittal was denied. [3, 14-15]

The question presented here, therefore, is whether the petitioner was denied procedural due process of law upon the Department of Justice hearing when the hearing officer asked general questions, evaded the request of the petitioner for adverse information and failed to give petitioner a full and fair summary of the adverse information appearing in the secret investigative report relied upon by the

[1] Numbers appearing herein within brackets refer to pages of the printed record in this case.

Department of Justice in making its recommendation to the appeal board.

IV.

The subpoena duces tecum issued required the United States Attorney and the Federal Bureau of Investigation to produce at the trial the secret FBI investigative report used by the hearing officer. [5-6] The Government made a motion to quash the subpoena at the trial. [3] The petitioner filed his affidavit in opposition to the motion to quash. [6-9] The affidavit showed the materiality of the report and called the court's attention to the fact that it was necessary to have the secret investigative report at the trial in order to determine whether the hearing officer unlawfully failed to give Simmons a full and fair summary of the unfavorable evidence appearing in the report at the hearing conducted by West, the hearing officer. [7-9]

The court ordered the subpoena quashed. [9-10] Complaint was made of the quashing of this subpoena upon appeal. [75]

The question presented here, therefore, is whether the district court erred when it quashed the subpoena duces tecum commanding the production of the FBI report and denied the petitioner the right to use it at his trial to determine if the hearing officer had failed to give the petitioner a full and fair summary of the unfavorable evidence in the secret FBI investigative report.

V.

Petitioner was ordered to report on January 6, 1953. [46-55-56, 72-73] This order commanded him to report for induction on January 19. [55-56] On January 16, it was developed at the hospital that petitioner's wife, because of an operation and physical condition, put a hardship and dependency case upon him. [21]

He obtained an affidavit from the attending physician that had supervision of his wife's case at the hospital. This

was filed with the local board on January 20, 1953. [20] The petitioner submitted this to the local board and requested it to reopen his case because of the hardship development, conditions beyond his control between the time of the issuance of the order to report for induction and the date that he was commanded to report for induction. [22] The local board (although it told Simmons that it would consider the affidavit), when he returned to find out what was done on February 2, 1953, informed him that the board was not going to consider the hardship and change of conditions shown in the affidavits. [22] The local board member told him: "That is your business. That is no concern of ours." [22]

The Director of Selective Service forwarded the letter showing a change of condition related to the board for consideration. [22-23, 59-60] Simmons showed that because of his wife's condition he was having to nurse her day and night. [24] The records show that the local board failed to reopen the case and recall the order to report for induction. In the motion for judgment of acquittal the petitioner contended that he had been denied his rights guaranteed by Section 1625.2 of the regulations and that the local board had acted illegally when it failed to reopen his case and recall the order to report for induction because of his changed circumstances over which he had no control and which justified a change in his classification to III-A. [13]

The motion for judgment of acquittal was overruled. [3, 14]

The question presented here, therefore, is whether the local board abused its discretion and refused to reopen the case of petitioner and reclassify him because of a change of circumstances over which he had no control and which required a new classification of dependency and hardship under the regulations because of the helpless condition of petitioner's wife, who was bedridden and suffering from galloping tuberculosis.

STATUTES AND REGULATIONS INVOLVED

The Universal Military Training and Service Act, 62 Stat. 604, 612, 622; 65 Stat. 75, 86, particularly Section 6(j), 50 U. S. App., Supp. V, § 456(j), is involved. Also involved are the Selective Service Regulations. Specific consideration must be given to Sections 1622.14, 1625.2, 1626.25 and 1626.26 (32 C. F. R. §§ 1622.14, 1625.2, 1626.25 and 1626.26). The pertinent portions of the statute and the regulations are lengthy. They are printed as Appendix B to this brief at pages 41 to 46.

STATEMENT OF THE CASE

The Facts

Simmons was born on April 8, 1927. [39] He registered with his local board on September 10, 1948. [40] A classification questionnaire was mailed to him on December 6, 1948. [41] He filled out the questionnaire, giving his name and address. [42] At the time he filed his questionnaire he was not one of Jehovah's Witnesses. He did not answer that he was a minister of religion. [43]

He showed that he was a chauffeur for the Civil Service Commission. [43] He worked 40 hours per week at his job. [43] At the time he filed his questionnaire he was not a conscientious objector; therefore he failed to sign Series XIV. [44] He explained in his testimony why he did not sign the conscientious objector blank in the questionnaire. [25-26]

Not having any grounds for deferment he claimed in his classification questionnaire that he was entitled to classification I-A. [26, 44]

On December 23, 1948, the local board placed him in Class I-A. [45] He was not called for induction during this period because there was no induction. Simmons, on June 4, 1951, was placed in the deferred classification of a married man, Class III-A. [45] He remained in this classification

until October 22, 1951, when he was placed in Class I-A again and notified of it. [45]

Simmons requested that he be provided with a special form for conscientious objector. This was mailed to him on October 25, 1951. [46] On October 30 he was ordered to report for a preinduction physical examination on November 15, 1951. [70]

Simmons filed with his local board on October 30, 1951, his conscientious objector form. [46] He signed Series I(B) showing that he was opposed to both combatant and noncombatant military service. [46] He answered that he believed in the Supreme Being. [47] He stated the nature of his belief. He showed that he relied upon the Scriptural commands of Jehovah God to remain unspotted from the world. He showed that he must obey God rather than man. He then answered that the nations and the armies of the present evil world were under the lordship of Satan the Devil. He stated that he must obey the commandment of God and remain unspotted and also that he could not violate the commandments of God that prohibit killing. [47]

Simmons showed that he got his conscientious objections as the result of a Bible study with Jehovah's Witnesses that began in November, 1949. He showed that he progressed in this study under the direction of Clarence Houze, a minister of Jehovah's Witnesses. He answered that he had received his religious training from Houze under the direction of the Watchtower Bible and Tract Society, legal governing body of Jehovah's Witnesses. [47]

In the conscientious objector form Simmons also answered that he did not believe in the use of force at all unless it "be under the supervision of Jehovah God." [47] He certified that the thing that consistently demonstrated the depth of his conviction was his course of study and his activity as a minister. He emphasized that this should demonstrate the depth of his convictions. [47-48] He stated that he had given public expression to his belief. [48]

He then listed the schools that he had attended, his employers and his places of residence. [48-49]

Simmons showed that his father had no religion and that his mother was a Baptist. [49] He said that he had never been a member of any military organization. [49] He showed that he was a member of Jehovah's Witnesses, and that the legal governing body of that organization was the Watchtower Bible and Tract Society. He showed that he had become a member of Jehovah's Witnesses in the middle of November, 1949. He gave the addresss of the church that he attended and the name of the presiding minister. [49-50] He stated that Jehovah's Witnesses had a belief of being conscientiously opposed to combatant and noncombatant service. He answered that he was not a member of any other organization. [50]

Simmons testified that he was claiming to be both a minister and a conscientious objector at the time he filed the form. He said that he tried to use the form also in an effort to get a minister's classification. [28, 29] The local board, after the conscientious objector form was filed on November 26, 1951, classified Simmons in I-A. It denied the minister's claim as well as the conscientious objector status. [45]

The local board sent the file to the appeal board. [41] The appeal board made a predetermination that the registrant should be denied the conscientious objector status. It forwarded his file to the Department of Justice for appropriate inquiry and hearing. [45] Thereafter there was an extensive investigation by the Federal Bureau of Investigation. This was followed by a hearing before the Department of Justice hearing officer. [19, 53]

Upon the hearing there was no extensive inquiry or discussion as to the conscientious objections of Simmons. The hearing officer merely asked a few brief questions. He then told Simmons that he had the FBI secret investigative report. He informed Simmons that the report stated that he had been hanging around pool halls and that was about all

the report said. The hearing officer then asked Simmons if he still did that at the time of the hearing. Simmons replied that he did not. Simmons said that he then asked the hearing officer, "What else was in the report?" He said that West, the hearing officer, did not answer the question directly but began to talk about the time when he was associated with a large law firm in Chicago. He then told Simmons that he knew all the justices of the Supreme Court of the United States. [19]

West then asked the wife of Simmons, who was present at the hearing, how Simmons was treating her. Simmons testified that his wife said "fine." West, the hearing officer, then told Simmons that he was going to make a recommendation to Washington in favor of his ministerial claim. [19] West, the hearing officer, did not inform Simmons of the other adverse evidence against his conscientious objector status appearing in the file. [19, 52-55]

Following a consideration of the report of the hearing officer to the Department of Justice a recommendation was made by the Assistant Attorney General. This was sent to the appeal board. The recommendation was that Simmons be denied his conscientious objector claim. The recommendation finds that Simmons believes in the Supreme Being. [53] It found that according to the investigative report Simmons had been reading the Bible during lunch hour and discussing his belief with his fellow workers. One informant who knew about Simmon's former wife stated that he had changed and he believed "registrant is now sincere."

The recommendation of the Department of Justice relies upon unfavorable and adverse evidence that was not called to the attention of Simmons upon the occasion of his personal appearance. Emphasis is placed upon the police record of Simmons involving trouble with his wife and claims of his abusing her. [54] The recommendation of the Department of Justice is also grounded on the conclusion of the hearing officer in his report that Simmons' religious activities were simultaneous with his draft liability. The De-

partment of Justice concluded that he had less than two years' religious training with Jehovah's Witnesses. The Assistant Attorney General, T. Oscar Smith, said that because of this his sincerity was questionable. The Assistant Attorney General recommended against the claim of Simmons for classification as a conscientious objector. [52, 55]

The appeal board classified Simmons in Class I-A. [19, 41] He was notified of this. [41]

He was ordered to report for induction. The order issued on January 6, 1953. He was commanded to report on February 9, 1953. [46, 55-56, 72-73]

On January 16, 1953, after Simmons was ordered to report for induction he discovered that his wife, who had been in the hospital for some time, had become seriously ill and incapacitated to such an extent that he had a dependent and a hardship case that entitled him to deferment and reclassification in Class III-A. [34]

On January 20, 1953, he filed a doctor's affidavit as to the seriousness of his wife's condition, which made her dependency upon him a hardship case. [20, 63] Simmons then requested the local board to reopen his case and to reclassify him in III-A, temporarily pending the continued hardship and absolute dependency of his wife. [20] Simmons explained that his wife had an operation because of an infected gland and also that she had eight ribs removed making her a total dependent. The affidavit showed that she was confined to bed with tuberculosis. [20, 21]

The local board members stated that they would consider the affidavit of dependency and change of condition. [21] Simmons returned to the local board on February 2, 1953, several days before he was ordered to report for induction to find out about what the board had done concerning his request for a reopening of his classification. The board members said: "We are not going to consider that." Simmons asked what was going to happen to him because of his wife's serious condition. The board members said: "That is your business. This is no concern of ours." [22]

Simmons wrote a letter to the Director of Selective Service. This was forwarded to the local board for a consideration of the dependency status. [22-23, 59-60] The local board did not reconsider the change in status and the hardship dependency claim of Simmons although the evidence showed that the new and changed condition had come about due to circumstances that were entirely beyond his control.

Simmons reported to his local board for forwarding to the induction station on January 19. At the induction station his examination was not completed. He was examined several times during the next several days. Finally his examination was completed on February 9, 1953. He was ordered to submit to induction on that date. He refused to submit, for which he was prosecuted. [46, 55-56, 72-73]

Form and History of Action Showing Jurisdiction in Courts Below

This criminal action was brought by indictment charging petitioner with a violation of the Universal Military Training and Service Act (50 U. S. C. App. §§ 451-470). Petitioner was charged with failing and refusing to submit to induction, contrary to the act. The indictment was filed on March 12, 1953. [1, 2, 4-5] The district court took jurisdiction under 18 U. S. C. § 3231. On May 19, 1953, the petitioner pleaded not guilty. [1, 2]

Petitioner caused to be issued and served upon the United States Attorney and the agent in charge of the Chicago Office of the Federal Bureau of Investigation a subpoena duces tecum. [2, 5-6] On the call of the case for trial September 18, 1953, the Government moved to quash the subpoena duces tecum. [3] The petitioner filed an affidavit in opposition to the motion to quash the subpoena duces tecum. In the affidavit petitioner stated that he needed the production of the FBI report so that it could be determined whether the hearing officer of the Department of Justice gave him the required full and fair summary of

the unfavorable evidence appearing in the FBI report as required by law. Petitioner said that if the production of the FBI report was not compelled he would be prejudiced. [6-9] The court ordered the subpoena duces tecum quashed. [3, 9-10]

The case proceeded to trial before the judge without a jury, which was waived. [1, 2, 15] At the close of all the evidence petitioner made his motion for judgment of acquittal. [3, 10-14] The motion for judgment of acquittal was denied. [3] On September 18, 1953, the trial court found the petitioner guilty and entered a judgment and commitment sentencing petitioner to the custody of the Attorney General for two years. [3, 14-15]

On September 28, 1953, a notice of appeal to the Court of Appeals was filed. [60, 74] The time for fiiing the record in the Court of Appeals was duly extended and the statement of points was duly filed as required by the rules of the court. [75]

REASONS FOR GRANTING THE WRIT

I.

The court below has decided that the rule of *Dickinson* v. *United States,* 346 U. S. 389 (Nov. 30, 1953), does not apply in determining whether there is basis in fact for the denial of the conscientious objector status to petitioner. This is in direct conflict with decisions of other courts of appeals on the same question. The court below said:

"Defendant contends, on authority of *Dickinson* v. *United States,* 346 U. S. 389, that the denial of a conscientious objection claim has a basis in fact only when the board has procured affirmative evidence which contradicts the representations made by a registrant in his application for exemption,—that the board must make a record to support its order. The *Dickinson* opinion has been so construed in *Weaver* v. *United States,* 210 F. 2d 815, 822-823 (CA-8); *Schuman* v. *United States,* 208 F. 2d 801 (CA-9); and

Jewell v. *United States*, 208 F. 2d 770, 771 (CA-6). However, we do not read the decision as authority for this proposition."

The decision below also conflicts with *Jessen* v. *United States*, 10th Cir., May 7, 1954, — F. 2d —, and *Pine* v. *United States*, 4th Cir., April 5, 1954, 212 F. 2d 93.

II.

The court below has decided that the recent conversion of petitioner as one of Jehovah's Witnesses is basis in fact for the denial of his conscientious objector status. This decision is in direct conflict with a decision of the United States Court of Appeals for the Ninth Circuit on the same matter.—*Schuman* v. *United States*, 9th Cir., Dec. 21, 1953, 208 F. 2d 801.

The court below said:

> "Defendant contends that the denial of his claim was based solely on the fact that he is a latecomer to his religious beliefs and that he did not assert his claim until some three years after registration, at a time when his induction was imminent. We agree, as an abstract proposition, that the length of time elapsing since one has espoused a faith, standing alone, will not furnish a decisive basis for denying conscientious objector status. However, we cannot subscribe to the view expressed in *Schuman* v. *United States*, 208 F. 2d 801, 805 (CA-9), that the board may never take this factor into account. . . .
>
> We cannot close the door to the selective service boards' use of any valid inference in ruling on classification questions."

III.

The court below has rendered a decision on whether there is basis in fact for the denial of the conscientious ob-

jector status to petitioner. The record showed in his case the same facts that were disclosed in a number of other cases decided by other Courts of Appeals. In those cases it was held on the same showing, that there was no basis in fact for the denial of the conscientious objector classification.

The holdings of other circuits with which the holding of the court below (that there was basis in fact for the denial of the classification) directly conflicts are: *Annett* v. *United States*, 10th Cir., June 26, 1953, 205 F. 2d 680; *United States* v. *Pekarski*, 2d Cir., Oct. 23, 1953, 207 F. 2d 930; *Taffs* v. *United States*, 8th Cir., Dec. 7, 1953, 208 F. 2d 320; *Jewell* v. *United States*, 6th Cir., Dec. 22, 1953, 208 F. 2d 770; *Schuman* v. *United States*, 9th Cir., Dec. 21, 1953, 208 F. 2d 801; *United States* v. *Hartman*, 2d Cir., Jan. 8, 1954, 209 F. 2d 366; *Pine* v. *United States*, 4th Cir., April 5, 1954, 212 F. 2d 93; *Jessen* v. *United States*, 10th Cir., May 7, 1954, — F. 2d —. See also *United States* v. *Close*, 7th Cir., June 10, 1954, — F. 2d — *United States* v. *Wilson*, 7th Cir., July 15, 1954, — F. 2d —. *United States* v. *Wilson*, 7th Cir., July 15, 1954, — F. 2d.

These cases ought not to be pushed aside on the specious but factitious ground that, because the courts in some of those cases discussed the speculations urged on the courts as basis in fact, the cases are different. They are not different because on the question of whether there was basis in fact the evidence in each case is identical to the facts in this case and the holdings were the opposite to that made by the court below in this case. Such attempted distinction would be a distinction without a difference. The cases above cited are identical to the facts in this case insofar as the statements in the draft board record showing conscientious objection are concerned.

IV.

The court below has decided another question of federal law that is not only in conflict with the decisions of another circuit, but is also "in conflict with applicable decisions of

this court." (Rule 19(1)(b)) The court below held that the secret FBI investigative report was not material or relevant. The petitioner contended that he needed it to be produced to show that there was no proper summary of the report given to him as required by *United States* v. *Nugent*, 346 U. S. 1, and due process of law. The decision below conflicts with *United States* v. *Andolschek*, 2d Cir., 142 F. 2d 503, and *United States* v. *Krulewitch*, 2d Cir., 145 F. 2d 76, 79. The holding is also out of accord with and in conflict with the decision of this Court in *United States* v. *Reynolds*, 345 U. S. 1, at page 12.

V.

In the event this Court finds that there are no conflicts of decision between the holding of the Court below and those in *Weaver* v. *United States*, 8th Cir., Feb. 19, 1954, 210 F. 2d 815; *Schuman* v. *United States*, 9th Cir., Dec. 21, 1953, 208 F. 2d 801; *Jewell* v. *United States*, 6th Cir., Dec. 22, 1953, 208 F. 2d 770; *Pine* v. *United States*, 4th Cir., April 5, 1954, 212 F. 2d 93; and *Jessen* v. *United States*, 4th Cir., April 5, 1954, 212 F. 2d 93, then there is presented here "an important question of federal law which has not been, but should be settled by this court." It is whether the rule of *Dickinson* v. *United States*, 346 U. S. 389 (Nov. 30, 1953), applies in conscientious objector cases.

There is no difference in the type of proof or the burden put on a conscientious objector and a registrant that claims classification as a governor, a congressman, a state legislator, a judge or a minister. The conscientious objector answers the same questionnaire given to all registrants by the Selective Service System. He goes further. He also fills out the special form for conscientious objector. The questions answered in this document are scrutinous.

The answers are evidence. The proof thus given is not mere allegations or claims. But it is proof. It establishes the facts. Evidence does not cease to be evidence because it is given by a conscientious objector. Solely because a man

partment of Justice report, we cannot say that it is arbitrary and capricious.

The only evidence in the file not previously referred to is the report of the Department of Justice. Summarizing the F.B.I. investigative file, this report stated that appellant had on three occasions exerted physical violence against, and had abused, his wife, and that, until some seven months immediately preceding the F.B.I. investigation, appellant was reputed to be a heavy drinker and gambler. The Justice Department report stated in part: "The Hearing Officer reports registrant impressed him as sincere but notes that his religious activities are coincident with pressing draft activities by officials and, therefore, recommends a I-A classification. * * * In addition to the fact that his religious activities coincide with pressing induction possibilities, registrant's absorption and sincerity as to his newly found religion is rendered more questionable by his abusiveness and the exercise of physical violence toward his wife. In this connection police records reflect a complaint by his wife as late as January 6, 1952." The point is that these evidentiary factors have a bearing on the question of sincerity. It is immaterial whether we would have concluded that the circumstances mentioned are sufficient to disprove appellant's sincerity. Their presence of record precludes our saying that the challenged order is without basis in fact.

We thus reach the question of whether appellant was accorded due process of law. He contends that the standards of due process were violated in his hearing before the Department of Justice hearing officer and that this vitiates the induction order. No transcript of the proceedings before the hearing officer appears of record. At his trial, appellant testified that he asked that officer for information as to all unfavorable evidence contained in the F.B.I. investigative report; that he was informed that evidence in this report indicated that he had been hanging around pool halls and that he had been questioned about this facet

is a conscientious objector a question as to his credibility is not raised because of it.—*Smith* v. *United States*, 4th Cir., July 29, 1946, 157 F. 2d 176.

Everything required to be proved by a conscientious objector is subject to checking by the local board. (*Dickinson* v. *United States*, 346 U. S. 389 (Nov. 30, 1953).) Any material answer given by him in his questionnaire or conscientious objector form may be contradicted. The answers are not such that they cannot be checked or the statements in them answered. The draft boards have as much authority to check answers in a conscientious objector case as they do in cases involving ministers of religion.—*Dickinson* v. *United States*, 346 U. S. 389 (Nov. 30, 1953).

There is no greater chance of evasion of the draft as a conscientious objector (required to do civilian work contributing to national health and welfare) than there is in any other claim for classification. There is less, in fact. The reason is that there is the scrutinous secret FBI investigative report. Assume in the case of a conscientious objector the FBI investigative report does not turn up evidence that is contradictory to the answers given by the conscientious objector. Assume the FBI report is favorable in every respect. The appeal board then has before it a stronger case of uncontradicted evidence supporting a claim than in the case of a minister whose case is not checked so carefully.

All the statute requires a conscientious objector to show is (1) that he believes in the Supreme Being; (2) that his belief produces his opposition to combatant and noncombatant service; (3) that his belief comes from religious training and belief; (4) that his belief does not spring from political, sociological or philosophical study. The first two elements above stated depend only on the answers of the registrant and none other. Congress commits the answer to these to him and to him only. The last two are subject to investigation and contradiction. These two are subject to positive proof.

of his behavior; that the hearing officer evaded his request relative to the other adverse evidence contained in his file, and that this evidence was not made known to him.

Before the trial, at appellant's request, a subpoena *duces tecum* issued to compel the United States Attorney and the Federal Bureau of Investigation to produce this file at his trial. On leave of court, the government moved to quash. Appellant filed an affidavit in opposition to the motion. Therein the contention which forms the basis for our inquiry was advanced, viz., that due process of law requires that a registrant be given a full and fair summary of the unfavorable evidence contained in the F.B.I. report employed by the hearing officer in making his recommendation, and that the report must be produced at a subsequent trial of the registrant for refusing to submit to induction in order to enable the court to determine whether the officer has complied with the procedural requirements. The court granted the government's motion and quashed the subpoena.

Appellant contends that the Supreme Court in *United States* v. *Nugent*, 346 U. S. 1, established the rule that registrant must be accorded a full and fair résumé of all adverse evidence contained in the F.B.I. file. In *United States* v. *Nugent*, 200 F. 2d 46, and *United States* v. *Packer*, 200 F. 2d 540, the Court of Appeals for the Second Circuit reversed the conviction of the defendants, holding that refusal of the Justice Department hearing officer to disclose the F.B.I. reports to defendants was a denial of due process of law in the induction process which vitiated subsequent orders to submit to induction into the armed forces. On certiorari the Supreme Court reversed these decisions, saying, 346 U. S. at pages 5-6, "We think that the statutory scheme for review, within the selective service system, of exemptions claimed by conscientious objectors entitles them to no guarantee that the F.B.I. reports must be produced for their inspection."

A contention was made that the statute, so construed, was unconstitutional. Reviewing the statutory scheme for

There is open to inquiry in the case of a conscientious objector, however, the subject of his sincerity. Conscientious means sincere. Insincerity means hypocrisy. The draft boards and the Department of Justice are authorized by statute to make extensive inquiry to determine whether the registrant claiming to be a conscientious objector is a hypocrite. In other words they may determine whether the registrant is practicing what he preaches. Does he say one thing and do another when he says that he conscientiously objects to participation in the armed forces? Is it true that he got his objections from religious training and belief? Both these questions are subject to answer the same as any other question put to any other registrant.

The term "conscientiously opposed" used in the statute is not a vague and indefinite statement that is impossible of definition. It does not defy the ordinary means of proof. The term is not as vague or as elusive as the court below makes it for the purpose of evading the duty imposed upon it by *Dickinson* v. *United States,* 346 U. S. 389 (Nov. 30, 1953); and *Estep* v. *United States,* 327 U. S. 114 (Feb. 4, 1946).

Is the court below correct in its decision that the *Dickinson* rule does not apply to conscientious objector cases? If it is, then it will be impossible for any federal court in any conscientious objector case, regardless of how strong the proof, to ever say that the draft board has denied the status without basis in fact! The court thus makes the rule in *Estep* v. *United States,* 327 U. S. 114 (Feb. 4, 1946), meaningless and wholly inapplicable in cases involving conscientious objectors. The court below has said so by its holding that the "no basis in fact" rule does not apply. It has thereby said that Congress intended to discriminate against the conscientious objector in favor of all other registrants when it came to a judicial review of the classification. The construction placed upon the act by the court below is contrary to the fair and just provisions of the act. (50 U. S. C. App. (Supp. V) § 451(c)) This is an important

selective service procedures, the court held that the "hearing" accorded to claimants of conscientious objector status, though it must be more than sham, does not require a formal judicial hearing comparable to a criminal trial. The court said: "Instead, the word [hearing] takes its meaning * * * from an analysis of the precise function which Congress has imposed upon the Department of Justice in [Section 456 (j)]. The duty to classify—to grant or deny exemptions to conscientious objectors—rests upon the draft boards, local and appellate, and not upon the Department of Justice. * * * The Department of Justice takes no action which is decisive. Its duty is to advise, to render an auxiliary service to the appeal board in this difficult class of cases. * * * [I]n this special class of cases, involving as it does difficult analyses of facts and individualized judgments, Congress directed that the assistance of the Department be made available whenever a registrant insists that his conscientious objection claim has been misjudged by his local board. Observers sympathetic to the problems of the conscientious objector have recognized that this provision in the statute improves the system of review by helping the appeal boards to reach a more informed judgment on the appealing registrant's claims. But it has long been recognized that neither the Department's 'appropriate investigation' nor its 'hearing' is the determinative investigation and the determinative hearing in each case. It has regularly been assumed that it is not the function of this auxiliary procedure to provide a full-scale trial for each appealing registrant. Accordingly, the standards of procedure to which the Department must adhere are simply standards which will enable it to discharge its duty to forward sound advice, as expeditiously as possible, to the appeal board. * * * It is always difficult to devise procedures which will be adequate to do justice in cases where the sincerity of another's religious convictions is the ultimate factual issue. It is especially difficult when these procedures must be geared to meet the imperative needs of mobilization and national

question of federal law that has not been, but which ought to be, decided by the Court.

VI.

The court below has held that the late conversion of the petitioner to Jehovah's Witnesses is basis in fact for the denial of the conscientious objector claim. If this Court does not find a conflict with *Schuman* v. *United States,* 9th Cir., Dec. 21, 1953, 208 F. 2d 801, then petitioner says there is presented here an important question of federal law which has not been, but which should be, settled by the Court. It is: whether the late conversion of a registrant to a religion that opposes participation in the armed forces of the United States is *per se* basis in fact for the denial of the conscientious objector status.

The statute does not freeze the exemption from military service to only those conscientious objectors that are such when they register. The regulations contemplate a change in status after registration. (32 C. F. R. § 1625.2) See also *Hull* v. *Stalter,* 7th Cir., 1945, 151 F. 2d 633; *United States* v. *Packer,* 2d Cir., 1952, 200 F. 2d 540, reversed on other grounds, 346 U.S. 1.—Compare *United States* v. *Clark,* W. D. Pa., June 26, 1952, 105 F. Supp. 613.

Congress had in mind the national policy of freedom of religion which permits the American people to have no religion if they choose none or change religions at their own free will. Surely Congress must have known that some of the 70 million that do not belong to any church would be seeing the light and embracing religion after war began or after the act went into effect. Certainly Congress must have had in mind the constant proselyting that is going on in this country by over 256 different religions.

There must be something expressed in the act that would compel an interpretation of it as claimed by the court below. The spirit of the act and the history of freedom of religion in this country compel a different construction, especially in the case of conscientious objectors. Proselyting

vigilance—when there is no time for 'litigious interruption.' *Falbo* v. *United States*, 320 U. S. 549, 554 (1944). Under the circumstances presented, we cannot hold that the statute, as we construe it, violates the Constitution." (Footnotes by the court omitted.) 346 U. S. at 7-10.

Quotation at length from the Nugent opinion is justified, we think, as demonstrative that the court did not presume to establish rules of procedure for the conduct of Department of Justice hearings. Appellant refers us to the language of the court appearing at page 6, "We think the Department of Justice satisfies its duties under Sec. 6 (j) when it accords a fair opportunity to the registrant to speak his piece before an impartial hearing officer; when it permits him to produce all relevant evidence in his own behalf and at the same time supplies him with a fair résumé of any adverse evidence in the investigator's report." He contends that by this language the Supreme Court announced the postulate that a fair résumé is a prerequisite to a fair hearing. The government insists, correctly we think, that the only issue before the court, which is pertinent to the question before us, was as to the right to inspect the F.B.I. file and that the least quoted language is *obiter* occurring in approving the procedure followed by the hearing officer in Nugent's hearing.

The government's contention is persuasive when the above quotations are considered together. Had the court intended to prescribe the minimum procedural rules for such hearings, it is not unreasonable to assume that it would have done so expressly in its discussion on the issue of constitutionality. There the court said that the hearing must be more than "sham" but need not be a "litigious controversy." Thus we are told that somewhere between these two extremes lies the line between due process and arbitrary action. We are told further that the procedure employed by the hearing officer in Nugent's case falls within the realm of due process. It does not follow from this that the Nugent procedure presents the minimum safeguards

is going on all the time. The New York *Times* (March 25, 1954) carried an account of a change in religions during the last ten years. It showed that 4,144,366 Roman Catholics have become Protestants and 1,071,897 Protestants have become Catholics during the last decade. This particular point is involved in the petition for writ of certiorari filed in *Gonzales* v. *United States,* No. 69, October Term, 1954.—See page 23 of the petition.

It is submitted, therefore, that this is a very substantial question of federal law which has not been, but which ought to be, decided by this Court.

VII.

There is presented another question of federal law that ought to be decided by this Court. The point has never yet been determined. It is whether a hearing officer of the Department of Justice is required by due process of law and the "fair and just" provisions of the act to give a fair hearing. If so then does a fair hearing prohibit the hearing officer in this case from failing and refusing to make a full and fair résumé of the unfavorable evidence in the secret FBI investigative report? The adverse evidence in the secret report was relied upon by the hearing officer and the Department of Justice in making their report and recommendation to the appeal board. The hearing officer questioned the petitioner directly on one item of unfavorable evidence. It was about his former carousing around before becoming one of Jehovah's Witnesses. Indirectly he, by asking petitioner's wife who was present, touched upon other unfavorable evidence. But this was not done directly so as to give a résumé or summary of the unfavorable evidence as required by law. He asked petitioner's wife how he was treating her now. At this point the petitioner asked for more unfavorable evidence. The general question to his wife was not a summary. The hearing officer then evaded him and refused to supply it by passing on to irrelevancies. He broke in to tell that he was personally ac-

which will afford the registrant due process. Furthermore, the court indicated that Nugent and Packer had waived their right to object to any failure on the part of the hearing officer to give them a full summary of the evidence because they had failed to request such a summary. 346 U. S. at 6, n. 10. Thus the issue now facing us was not before the court in Nugent.

We are referred to numerous authorities to support appellant's contention. Brief reference to some of them will suffice to dispose of the point. In *United States* v. *Evergam*, 102 F. Supp. 128, the court held that proof on the face of the report of the hearing officer that his recommendation was based on his own belief, not on his appraisal of registrant's sincerity in his professed belief, to be a denial of due process which vitiated any order based thereon. *Eagles* v. *Samuels*, 329 U. S. 304, approved the use of theological panels to advise the local board with respect to ministerial claims, provided the information received from the panel be placed in the registrant's file and available to him. *United States* v. *Balogh*, 157 F. 2d 939 (CA-2), reversed a conviction of a registrant whose classification followed a referral of a claim to what the court found to be an illegally constituted theological panel. In *United States* v. *Cain*, 149 F. 2d 338 (CA-2), the court held that concealment of the identity of the members of a theological panel from a registrant and adventures of such panel into questions outside of the field of ecclesiastics vitiated an order based thereon. The court in *DeGraw* v. *Toon*, 151 F. 2d 778 (CA-2), ordered a serviceman released from military custody where his local board had concealed from him damaging evidence in his selective service file on which his classification and induction rested. These authorities are relevant only for the basic postulate on which each decision rests, namely, that a registrant is entitled "to know and confront the evidence" contained in his selective service file upon which his classification is based, *DeGraw* v. *Toon*, *supra* at 779, and to appear before a legally constituted advisory

quainted with all the members of the Supreme Court of the United States and that he was once a member of the largest law firm in Chicago.

The court below held that the unfair action of the hearing officer in not giving a full and fair summary of the adverse evidence did not constitute a violation of the rule laid down by this Court in *United States* v. *Nugent*, 346 U. S. 1, 6. The court below also held that *Nugent* did not require a full and fair résumé. Insofar as the court below made this holding it is submitted that the decision is in conflict with *United States* v. *Nugent*, 346 U. S. 1, 6. This Court has jurisdiction, therefore, to grant the writ on this question because the court below has "decided a federal question in a way in conflict with applicable decisions of this court." —Rule 19(1)(b).

The action of the hearing officer in refusing to give a full and fair summary denied petitioner due process of law. Read *United States* v. *Bouziden*, W. D. Okla., 1952, 108 F. Supp. 395. That case is directly in point.

The holding by the court below (that *United States* v. *Nugent*, 346 U. S. 1, 6, does not require a full and fair résumé) is in conflict with the interpretation placed upon that decision by the Department of Justice under Section 6(j) of the act. The Department of Justice, after the decision in the *Nugent* case, charged the procedure for hearing officers. Before that decision it was the practice of the Department of Justice to mail a notice such as that apearing in footnote 10 of the opinion in *United States* v. *Nugent*, 346 U. S. at page 6. The instructions then mailed out notified the registrant of his right to be provided the unfavorable evidence upon request. Paragraph 5 of the present instructions does not authorize the hearing officer merely to ask general questions and evade a registrant. What the hearing officer did is contrary to the present instructions saying what is a fair résumé. The instructions provide the registrant with a written and full résumé of all of the unfavorable information appearing in the report

agency which will frame its advice on the standards prescribed by the statute.

In *United States* v. *Bouziden*, 108 F. Supp. 395, the court held the failure of the hearing officer to inform a registrant of the adverse evidence on which his report and the Justice Department recommendation rested to be a denial of due process. And the Nugent case has been construed as requiring a full summary of adverse evidence contained in the registrant's F.B.I. file, *i.e.*, that failure of a hearing officer to give the registrant such a summary is a denial of due process which vitiates all subsequent proceedings in his case. *United States* v. *Evans*, 115 F. Supp. 340. This ruling has been followed in *United States* v. *Edmiston*, 118 F. Supp. 238; *United States* v. *Stull*, decided Nov. 6, 1953 (E. D. Va.); *United States* v. *Stasevic*, 117 F. Supp. 371; *United States* v. *Parker*, decided Dec. 2, 1953 (D. Mont.); and *United States* v. *Brussell*, Nov. 30, 1953 (D. Mont.). In each of these cases, however, the Evans decision has been adopted without analysis or evaluation. To the extent that these decisions hold that the registrant must be given an opportunity to know and rebut adverse evidence in his selective service file, which file must support a classification order of it is to survive judicial scrutiny, they merely restate accepted principles of due process in selective service cases. Since the F.B.I. file is no part of a registrant's selective service file, the holding in the Evans case that only a full summary by the hearing officer will satisfy due process requirements is, we believe, predicated on error in at least two respects. First, the decision is expressly premised on the postulate that, in a trial for the offense of refusing to submit to induction, the government has the burden of proving the validity of the classification on which the induction order is based. We consider this premise wholly inconsistent with the limited scope of judicial review permitted under the principle announced in *Estep* v. *United States*, 327 U. S. 114. Secondly, we cannot agree, as we have previously pointed out, with an interpretation of the Nugent

given by informers. This written summary accompanies the instructions without request. Read paragraph 5 of the notice and instructions, Appendix C, appearing at pages 47-49, below.

It is submitted, therefore, that this is a very substantial question of federal law which has not been, but which ought to be decided by this Court.

VIII.

On the trial in the district court the question arose as to whether the hearing officer gave petitioner a full and fair summary. Before the trial started petitioner subpoenaed the FBI report for the use of the trial court in deciding the question. The trial court sustained the motion of the Government to quash the subpoena. The court below held that the ruling of the trial court was proper.

The position of petitioner can be simply stated by an analogy. Suppose petitioner wrote a review on a certain book. Assume that in a federal criminal trial it becomes necessary to determine whether the book review is fair and just. What is the only way that the district judge could decide such question?

It would be by reading the book and comparing the review with it. The district judge was required to do the same thing here. He should have compared the testimony of the petitioner with the FBI report. Then and then only could he decide whether a full and fair résumé required by *United States* v. *Nugent*, 346 U. S. 1, 6, was given to petitioner. He did not do it. This was error because the FBI report was not privileged against production. (*United States* v. *Andolschek*, 2d Cir., 142 F. 2d 503; *United States* v. *Krulewitch*, 2d Cir., 145 F. 2d 76, 79; *United States* v. *Reynolds*, 345 U. S. 1, 12) Several federal district courts have held that production of the secret FBI investigative reports may be compelled by subpoena duces tecum at the trial of cases such as this.—*United States* v. *Evans*, D. Conn., Aug. 20, 1953, 115 F. Supp. 340; *United States* v.

case as establishing a full summary as an absolute criterion for measuring the legality of the Justice Department hearing.

The line between "sham" and a "litigious proceeding" should, we believe, be drawn without regard to procedural rules to meet the requirements of basic fairness consistent with the limitation placed on the statutory provision of finality. If the government must point to secret evidence to establish any basis in fact for a particular classification, to evidence which the registrant has been denied an opportunity to know and rebut, we do not doubt that the proceeding is so lacking in basic fairness as to require that the classification be declared void. The point to be emphasized, however, is that in any event the government cannot use the F.B.I. file in a criminal trial. We do not read the Nugent case as requiring anything more than that evidence on which a classification order must find its support must have been called to the registrant's attention during the classification process. Applying these principles, we cannot hold that appellant was denied due process of law. As previously pointed out, the record affords a basis in fact for his classification without reference to the Justice Department's report to the appeal board. In view of this fact, we cannot say that the action of the board was arbitrary.

Furthermore, it appears that the hearing accorded appellant conformed to those standards of procedure set forth in Nugent to enable the Department "to discharge its duty to forward sound advice to the appeal board." Assuming *arguendo*, that sound advice is possible only if the hearing officer has heard both sides of the story, the test has still been met. Two types of adverse evidence contained in appellant's F.B.I. file, *i.e.*, evidence of drinking and carousing and evidence of brutality and abuse toward his wife, were referred to in the Department's report to the appeal board. By his own admission, appellant was informed of the first type and was questioned about this conduct. He testified that he informed the hearing officer that he had changed

Edmiston, D. Nebr. Omaha Div., Jan 28, 1953, 118 F. Supp. 238; *United States* v. *Stasevic*, S. D. N. Y., Dec. 16, 1953, 117 F. Supp. 371; *United States* v. *Stull*, No. 5634, Eastern District of Virginia, Richmond Division, Nov. 6, 1953; *United States* v. *Parker*, No. 3651, District of Montana, Butte Division, Dec. 2, 1953; *United States* v. *Brussell*, No. 3650, District of Montana, Butte Division, Nov. 30, 1953. An envelope marked Appendix D containing printed copies of the unreported decisions accompanies this petition.

The holding of the court below that the FBI report was not material is out of order. The question involved was the error in quashing the subpoena. The materiality of the evidence could not be determined until after the evidence was considered on the trial. The motion to quash was determined long before all the evidence was in.

It is impossible, moreover, for the trial court to determine the materiality of the FBI report without seeing it. The procedure of the court below in ruling of the materiality upon a review of the order quashing the subpoena is putting the cart before the horse. Materiality is conclusively presumed, without considering the evidence, on deciding whether a motion to quash was properly or improperly sustained.—Compare *United States* v. *Schneiderman*, S. D. Cal., 104 F. Supp. 405.

It is submitted, therefore, that this is a very substantial question of federal law which has not been, but which ought to be, decided by this Court.

CONCLUSION

WHEREFORE, for the reasons above stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

HAYDEN C. COVINGTON

Counsel for Petitioner

August, 1954.

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 11011. OCTOBER TERM, 1953, APRIL SESSION, 1954.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

ROBERT SIMMONS,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 15, 1954.

Before MAJOR, *Chief Judge*, DUFFY and LINDLEY, *Circuit Judges.*

LINDLEY, *Circuit Judge.* Defendant was charged with willfully refusing to submit to induction into the armed forces of the United States in violation of the Universal Military Training and Service Act, 50 App. U. S. C. Sec. 462. He admitted that he had refused to submit, but averred that the induction order was void by reason of the invalidity of his selective service classification which denied his claim of exemption from service as a conscientious objector. This appeal followed a judgment of conviction entered by the court sitting without a jury.

We are faced with a situation where repetition of certain basic concepts may not be amiss. The issues before us, subject as they are to exaggerated emotionalism, are diffi-

cult for an impartial arbiter since they demand reconciliation of an apparent conflict between a paramount right of freedom of conscience and religion and an equally paramount duty of every individual to defend his sovereign nation. This conflict is ably discussed in *United States* v. *Izumihara*, 120 F. Supp. 36. Congress, as the legislative voice of the sovereign, might have demanded unequivocal support from every person within its jurisdiction when it framed the selective service laws. As an obvious expression of conviction that greater strength lay in the preservation thereby afforded to freedom of conscience than in universal participation in the armed forces, Congress provided an exemption from military service to those who, by reason of their religious training and belief, are conscientiously opposed to participation in war. 50 App. U. S. C. Sec. 456 (j). This exemption, however, is an exception to a general statute applicable to "every male person" within a defined age group, 50 App. U. S. C. Sec. 453, 454 (a), and is, therefore, a privilege extended by legislative grace. To avail one of this privilege, application must be made to the agency established by the statute, the local board, which is empowered to decide each such claim of privilege, subject to administrative appeal as provided by statute. 50 App. U. S. C. Sec. 456 (j).

The task of probing into and intelligently appraising the conscience of another is a difficult and unhappy one; but we should bear in mind that Congress has imposed this onus not upon the courts but upon the local board whose orders "within their respective jurisdictions" are expressly made final "subject to the right of appeal to the appeal boards herein authorized." 50 App. U. S. C. Sec. 460 (b) (3). See *United States* v. *Adamowicz*, decided March 19, 1954 (N. D. Ill.). Judicial review of such orders is severely restricted. *Estep* v. *United States*, 327 U. S. 114. Our duty is done if we be solicitous that our decision on the issues before us accords to the individual defendant due process of law without

losing sight of the full purpose of the Act which Congress has determined to be in the best national interest.

The teachings applicable to the general field of administrative law are of little aid in judicial review of orders issued by the selective service agencies. The phrase "within their respective jurisdictions" employed in 50 App. U. S. C. Sec. 460 (b) (3) has been interpreted to limit finality of such orders to those which the administrative agency has jurisdiction to make. In the language of the Supreme Court, this jurisdictional question is reached by the courts in any case "only if there is *no basis in fact* for the classification which [an administrative board] gave the registrant." (Emphasis supplied.) *Estep* v. *United States*, 327 U. S. 114, 122.

Though the scope of judicial review within the "basis of fact" concept lacks exact definition, certain definite conclusions follow from pronouncements by the court in *Estep* and subsequent cases. Obviously the burden is on the claimant to prove himself to be within the group entitled to claim the privilege. The court reviewing an order denying such a claim of privilege may not weigh the evidence. The selective service file may be scrutinized only for the narrow purpose of determining whether any factual basis supports the classification, and in its scrutiny the reviewing court may not require adherence by the administrative body to the niceties of judicial rules of evidence. When and if the court determines that the contested order rests on a basis in fact, its jurisdiction ends, even though the court be convinced that the order is erroneous. See generally *Estep* v. *United States, supra; Dickinson* v. *United States*, 346 U. S. 389; *Cox* v. *United States*, 332 U. S. 442; *Eagles* v. *Samuels*, 329 U. S. 304; *Eagles* v. *Horowitz*, 329 U. S. 317; *Gibson* v. *United States*, 329 U. S. 338.

Defendant contends, on authority of *Dickinson* v. *United States*, 346 U. S. 389, that the denial of a conscientious objection claim has a basis in fact only when the board has procured affirmative evidence which contradicts the representations made by a registrant in his application for

exemption,—that the board must make a record to support its order. The *Dickinson* opinion has been so construed in *Weaver* v. *United States*, 210 F. 2d 815, 822-823 (CA-8); *Schuman* v. *United States*, 208 F. 2d 801 (CA-9); and *Jewell* v. *United States*, 208 F. 2d 770, 771 (CA-6). However, we do not read the decision as authority for this proposition.

Dickinson was convicted of refusing to submit to induction into the armed forces in violation of an order based on a selective service determination that he was not entitled to a claimed minister of religion classification. After reaffirming the "basis in fact" test of Estep, the court found no factual basis in the record to support the denial of the claimed exemption. The court said, 346 U. S. at 396-397: "The court below in affirming the conviction apparently thought the local board was free to disbelieve Dickinson's testimonial and documentary evidence even in the absence of any impeaching or contradictory evidence. * * * However, Dickinson's claims were not disputed by any evidence presented to the selective service authorities nor was any cited by the Court of Appeals. The task of the courts in cases such as this is to search the record for some affirmative evidence to support the local board's overt or implicit finding that a registrant has not painted a complete or accurate picture of his activities. We have found none here. (The court then states that local boards are not bound by traditional rules of evidence and that courts may not apply a test of substantial evidence.) However, the courts may properly insist that there be some proof that is incompatible with the registrant's proof of exemption. * * * When the uncontradicted evidence supporting a registrant's claim places him prima facie within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concept of justice." Thus the court says that once a registrant has made out a prima facie case, which is not contradicted, a denial of the exemption claimed is without factual basis. We cannot apply this

principle generally to every case without regard to the quality of the proof made by the registrant.

Furthermore, this language must be interpreted in the light of the claim and proofs made by Dickinson. Thus, a distinction must be drawn, we believe, between a claim of ministerial status and a claim of conscientious objection status as to susceptibility of proof. Whether a registrant is a minister in the statutory sense, having as his principal vocation the leadership of and ministering to the followers of his creed, is a factual question susceptible of exact proof by evidence as to his status within the sect and his daily activities. No search of his conscience is required. Even though the only tenet of his cult be a belief in war and bloodshed, he still would be exempt from military service if he were, in fact, a minister of religion. Is he affiliated with a religious sect? Does he, as his vocation, represent that sect as a leader ministering to its followers? These questions are determinative and subject to exact proof or disproof.

The conscientious objector claim admits of no such exact proof. Probing a man's conscience is, at best, a speculative venture. No one, not even his closest friends and associates, can testify to a certainty as to what he believes and feels. These, at most, can only express their opinions as to his sincerity. The best evidence on this question may well be, not the man's statements or those of other witnesses, but his credibility and demeanor in a personal appearance before the fact-finding agency. We cannot presume that a particular classification is based on the board's disbelief of the registrant, but, just as surely, the statutory scheme will not permit us to burden the board with the impossible task of rebutting a presumption of the validity of every claim based ofttimes on little more than the registrant's statement that he is conscientiously opposed to participation in war. When the record discloses any evidence of whatever nature which is incompatible with the claim of exemption we may

not inquire further as to the correctness of the board's order.

Conscientious objector cases cannot be rationalized as defendant's argument would have us do and some courts seemingly have tried to do. Affiliation with a particular religious sect does not *per se* entitle a registrant to conscientious objector status. The duty imposed on the boards is to determine subjectively and objectively the sincerity of the individual's belief, not the nature of the teachings of any religious faith. Each case must stand or fall on its own facts. Were this not true, the mass conversion of males, eligible for the draft, to particular faiths might be justified merely because of the "hot breath of the draft board" on their necks. *United States* v. *Izumihara*, 120 F. Supp. 36, 41. Although this does not make every member of any sect suspect, the temptation present for those who would evade the draft is a factor which we should not foreclose the boards from considering on a claim of exemption. We could justify doing so under the Dickinson decision only on proof of a prima facie case for exemption, when the only conclusion possible on the record is that the denial of a claim of exemption is arbitrary and capricious. We could, under such circumstances, impose on the board the burden of making a record to support its order.

The uncontroverted evidence in the Dickinson case was that the draftee had been designated by the governing body of his sect, as a fulltime pioneer minister; that he was the presiding minister over a "Company" encompassing members residing in an area of some 5,000 square miles; that, as presiding minister, he devoted some 150 hours per month to missionary work; that he arranged and presided over some three or four meetings of his "Company" each week; that he instructed prospective ministers, and that his subsistence was derived from the benevolence of his followers and some five hours per week devoted to secular employment. The court found no evidence in the record to contradict this "prima facie" proof of a minister of religion

status, and held that this factual proof could not be ignored by the board, in the absence of affirmative evidence to rebut it. The decision does not impose on the boards the burden of rebutting every claim made irrespective of the proof offered by the applicant. So to construe it would be to convert a privilege granted by legislative grace into an absolute right.

Applying these standards, is the order before us arbitrary and capricious, rendering appellant's classification void? We think not. In executing his classification questionnaire (SSS Form 100), appellant did not claim conscientious objector status. He stated that on the basis of "facts set forth in this questionnaire * * * my classification should be I-A." He was given a preliminary classification of I-A, in which he remained for some two and one-half years until June 4, 1951, when he was reclassified III-A (dependency).

On October 22, 1951, appellant was again classified I-A. On October 25, 1951, he requested SSS Form 150 to claim exemption from military service as a conscientious objector (I-O). On October 30, 1951, he was ordered to report for his preinduction physical examination. On the same day he filed Form 150, in which he stated that he was conscientiously opposed to either combatant or noncombatant military service; that his conscientious objection to such service grew out of beliefs acquired through a course of Bible study begun in 1949, under the direction of his sect; that he became a member in November 1949, and that he did not believe in the use of force except under the direction "of Jehovah God." Thereafter, he was given a hearing before his local board, which found the evidence insufficient to require reopening his classification. The appeal board, after submitting appellant's claim to the Department of Justice for investigation and hearing, by unanimous vote, rejected his claim and sustained his classification as I-A.

Defendant contends that the denial of his claim was based solely on the fact that he is a latecomer to his religious

beliefs and that he did not assert his claim until some three years after registration, at a time when his induction was imminent. We agree, as an abstract proposition, that the length of time elapsing since one has espoused a faith, standing alone, will not furnish a decisive basis for denying conscientious objector status. However, we cannot subscribe to the view expressed in *Schuman* v. *United States*, 208 F. 2d 801, 805 (CA-9), that the board may never take this factor into account. See *Corrigan* v. *Secretary of the Army*, 211 F. 2d 293 (CA-9), in which defendant claimed he was converted to conscientious objection to war while listening to orientation instruction given immediately before induction. Espousal of certain beliefs coincident with pressing induction demands, when coupled with other evidence which casts doubt on the sincerity of an individual claimant, may well support an inference that the espousal of the religious belief was motivated not by conscience but by a desire to remain a civilian. We cannot close the door to the selective service boards' use of any valid inference in ruling on classification questions. To do so would disembowel the statute and refute the express congressional purpose in its enactment.

The government cites certain negative circumstances which it contends support the classification. Appellant did not assert his claim until some two years after he became a member of Jehovah's Witnesses and more than two and one-half years after he had been classified I-A, on his own statement that such classification was proper. His claim was supported only by his own statement. No other members of the sect appeared in his behalf. Affidavits of no other members were filed in his behalf. Considering his claim in the light of those of other members of the sect, as the board was entitled to do, on the evidence of record, we cannot say that its denial of his claim is without basis in fact. *United States* v. *Dal Santo*, 205 F. 2d 429, cert. denied 346 U. S. 858 (CA-7). The order may well have been erroneous, but on the record before us, excluding reference to the De-

his ways. By his own admission, he and his wife were asked questions relating to his abuse of her. Appellant was present. His wife was present. He was afforded an opportunity to have other witnesses present. Thus, questions were addressed to appellant's witnesses in his presence which were sufficient to inform him of all adverse evidence in the file brought to the attention of the classifying agency, the appeal board. This situation differs only in degree from that before the Supreme Court in *United States* v. *Packer*, 346 U. S. 1, where the court said at 7, n. 10: "Nor was respondent Packer denied his right to be advised of the general nature of any evidence in the FBI report which might defeat his claim. In response to his question, the hearing officer told him there was nothing unfavorable in it. The hearing officer's report, which was transmitted to the appeal board, corroborates this view. Nothing in the FBI report was transmitted to the appeal board, and thus it was given no indication that the FBI report was unfavorable." A complete cummary may well be preferable procedure, but it is not the function of the court to require it as the only proper procedure.

In view of what has been said, the contents of the F.B.I. file were irrelevant to any issue before the trial court and the court did not err in quashing the subpoena. *United States* v. *Evans*, 115 F. Supp. 340, and the line of cases following it are not persuasive authority for requiring production of the F.B.I. file at trials of this nature, because of the basic fallacies in reasoning on which, as we have previously pointed out, those decisions rest.

We do not preclude the possibility of a case of this nature arising in which examination by the court of the FBI file might be necessary if the government is to meet the averment of a denial of due process of law. But this cause does not fall in that category. We should be reluctant to compel disclosure of investigative files in this type of case. As offensive as may be the thought of the nameless, secret, hidden informer, anonymity of persons interviewed is a

virtual necessity in this type of case, if the Department of Justice is to be unfettered in its appointed tasks of investigating claims of conscientious objection and of forwarding sound advice to the appeal boards. A holding that these files must be disclosed in every case would effectively tie the hands of draft officialdom, a result which we should be hesitant to promote.

We must consider briefly a final contention made by appellant. On January 20, 1953, several days after receipt of his notice to report, he submitted to the clerk of his local board a letter from one Charles K. Fetter, M.D., to the effect that his wife was seriously ill and that she was dependent on him for support and care. Appellant testified that he told the clerk he had learned of this condition only on January 16 and requested that his classification be reopened. No action was taken by the board. This refusal of the board to reopen was not, as appellant contends, an abuse of its sound discretion. A classification "may" be reopened after the registrant has been ordered to report for induction on a "written request" supported by "written evidence" of facts not previously considered by the board, only if the board "specifically finds there has been a change" in status "resulting from circumstances over which the registrant had no control." Selective Service Regulation 1622.2, 32 C. F. R. Sec. 1622.2. Appellant made no written request and submitted no written evidence of facts surrounding his wife's incapacitation on which he relied to support his dependency claim. We cannot say the board abused its discretion.

We conclude that appellant's classification is founded on an adequate basis in fact and that he was not denied due process. The judgment is affirmed.

APPENDIX B

STATUTES AND REGULATIONS INVOLVED

Section 1(c) of the Universal Military Training and Service Act (50 U. S. C. App. (Supp. V) § 451(c)) provides:

"The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."—June 24, 1948, ch. 625, title I, § 1, 62 Stat. 604, amended June 19, 1951, ch. 144, title I, § 1(a) 65 Stat. 75.

Section 6(j) of the act (50 U. S. C. App. (Supp. V) § 456(j), 65 Stat. 75, 83, 86) provides:

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing

to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recom-

mendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."—50 U. S. C. App. (Supp. V) § 456(j), 65 Stat. 75, 83, 86.

Section 1622.14 of the Selective Service Regulations (32 C. F. R. § 1622.14 (1951 Rev.)) provides:

"*Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.*—(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to both combatant and noncombatant training and service in the armed forces."

"*When Registrant's Classification May Be Reopened and Considered Anew.*—The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

Section 1626.25 of the Selective Service Regulations (32 C. F. R. § 1626.25 (1951 Rev.)) provides:

"*Special Provisions When Appeal Involves Claim That Registrant Is a Conscientious Objector.*—(a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:

"(1) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to combatant training and service in the armed forces, but not conscientiously opposed to noncombatant training and service in the armed forces, the appeal board shal. first determine whether or not such registrant is eligible for classification in a class lower than Class I-A-O. If the appeal board determines that such registrant is eligible for classification in a class lower tha. I-A-O, it shall classify the registrant in that class. If the appeal board determines that such registrant is not eligible for classification in a class lower than Class I-A-O, but is eligible for classification in Class I-A-O, it shall classify the registrant in that class.

"(2) If the appeal board determines that such registrant is not eligible for classification in either a class lower than Class I-A-O or in Class I-A-O, the appeal board shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

"(3) If the registrant claims that he is, by reason of religious training and belief, conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces, the appeal board shall first determine whether or not the registrant is eligible for classification in a class lower than Class I-O.

If the appeal board finds that the registrant is not eligible for classification in a class lower than Class I-O, but does find that the registrant is eligible for classification in Class I-O, it shall place him in that class.

"(4) If the appeal board determines that such registrant is not entitled to classification in either a class lower than Class I-O or in Class I-O, it shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

"(b) No registrant's file shall be forwarded to the United States Attorney by any appeal board and any file so forwarded shall be returned, unless in the 'Minutes of Action by Local Board and Appeal Board' on the Classification Questionnaire (SSS Form No. 100) the record shows and the letter of transmittal states that the appeal board reviewed the file and determined that the registrant should not be classified in either Class I-A-O or Class I-O under the circumstances set forth in subparagraphs (2) or (4) of paragraph (a) of this section.

"(c) The Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recom-

ment to the appeal board that such objections be not sustained.

"(d) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant both the letter containing the recommendation of the Department of Justice and the report of the Hearing Officer of the Department of Justice."

Section 1626.26 of the Selective Service Regulations (32 C. F. R. § 1626.26 (1951 Rev.)) provides:

"*Decision of Appeal Board.*—(a) The appeal board shall classify the registrant, giving consideration to the various classes in the same manner in which the local board gives consideration thereto when it classifies a registrant, except that an appeal board may not place a registrant in Class IV-F because of physical or mental disability unless the registrant has been found by the local board or the armed forces to be disqualified for any military service because of physical or mental disability.

"(b) Such classification of the registrant shall be final, except where an appeal to the President is taken; provided, that this shall not be construed as prohibiting a local board from changing the classification of a registrant in a proper case under the provisions of part 1625 of this chapter."

APPENDIX C

(Copy of Notice of Hearing Officer and Instructions to Registrant Used After July, 1953)

Department of Justice
Washington, D. C.

NOTICE OF HEARING

....
(CITY) (STATE) (DATE)

To: .....

Name of Registrant

....
(STREET ADDRESS) (CITY) (STATE)

You are hereby notified that before the undersigned Hearing Officer at Room ...., ...
(BUILDING) (STREET ADDRESS)

.... at ..... o'clock on
(CITY) (STATE) (HOUR)

....., ..., 195.., a hearing at
(MONTH) (DAY)

which you are requested to be present, will be held by the Department of Justice to consider your claim to exemption from training and service under the Universal Military Training and Service Act by reason of your alleged conscientious objection to participation in war in any form.

....., Hearing Officer
Special Assistant to the Attorney General

(NEW INSTRUCTIONS SINCE JULY 1953)

Addendum No. 1 to Instructions to Hearing Officers Appointed Pursuant to the Universal Military Training and Service Act

Notice of Hearing and Instructions to Registrants Whose Claims for Exemption as Conscientious Objectors Have Been Appealed

1. Pursuant to the provisions of section 6(j) of the Universal Military Training and Service Act (P. L. 51, 82nd Cong., 1st Session; 50 USC App. 466(j), hereinafter referred to as the Act, and section 1626.25 of the Selective Service Regulations, the Department of Justice will make an inquiry and hold a hearing with respect to the character and good faith of the registrant's objections to training and service under the Act on the ground that the registrant is conscientiously opposed to participation in war in any form. The scope of the hearing is restricted to consideration of the merits of the conscientious objector claim. Consideration of ministerial claims and all other claims in within the exclusive jurisdiction of the Selective Service System.

2. The hearing will be conducted by the undersigned, a Hearing Officer duly designated by the Department of Justice as a Special Assistant to the Attorney General of the United States.

3. It is incumbent upon the registrant to establish that he is entitled to the conscientious objector classification he claims. The registrant has a right to appear at the hearing and make a full and complete presentation of his claim. The registrant may testify orally and may present witnesses in support of his claim. However, no Government funds are available for the payment of witness fees or travel expenses.

4. The registrant may also submit at the hearing written statements or documents, or certified copies thereof, in support of his claim. Written statements shall be sworn to

or affirmed before a notary public or other persons authorized to administer oaths.

5. Attached hereto is a resume of the information developed by the inquiry conducted pursuant to the aforementioned Act. At the hearing the registrant will be entitled to discuss the information contained in the resume and to present witnesses to refute or corroborate such information.

6. The hearing will not be in the nature of a trial or judicial proceeding, but will be informal and non-legalistic. Legal rules of evidence will not apply at the hearing, but reasonable bounds will be maintained as to relevancy and materiality. In addition to his witnesses the registrant may have an attorney, relative, friend, or other adviser present at the hearing. Such person, whether an attorney or not, will not be permitted to object to questions, or to make any argument concerning the proceeding. In order that the conduct of the hearing may comport with the necessary requirements of dignity, orderliness, and expedition, the Hearing Officer will be the sole judge in the matter of choice of a method of procedure designed to effectuate the desired result.

7. Failure to comply with these instructions may result in the termination of the proceeding.

....., Hearing Officer